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No. 74-960

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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GEORGE MITCHELL & ASSOCIATES, INC.,
*Petitioner*

v.

TORBERT H. MACDONALD & SIDNEY R. YATES,
*Respondents*

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**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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### OPINION BELOW

The opinion of the Court of Appeals is reported at 505 F.2d 355.

### QUESTION PRESENTED

Whether the Court of Appeals misapprehended or grossly misapplied the substantial-evidence standard in reversing, as not supported by substantial evidence, a finding of the Federal Power Commission that allowing a seller a rate 65% in excess of the applicable just-and-reasonable area ceiling would not produce an excessive profit for the seller.

## STATEMENT*

In October 1971, the Federal Power Commission, on the basis of an extensive evidentiary record, fixed just and reasonable rate ceilings for the Other Southwest Area, FPC Opinion No. 607, 46 FPC 900, affirmed sub nom. Shell Oil Co. v. F.P.C., 484 F.2d 469 (5th Cir. 1973), cert. denied sub nom. Mobil Oil Corp. v. F.P.C., 417 U.S. 973 (1974). The rate ceilings used industry-wide costs (including a fair return) as the major point of reference, and were designed to provide incentive to producers to explore for and dedicate gas to the interstate market.

In August 1972, petitioner George Mitchell & Associates filed with the Commission a request seeking "special relief" from the area ceilings; specifically, Mitchell requested that its rates under a 1954 contract covering sales from a group of Texas counties to Natural Gas Pipeline Company of America be increased from 17.625¢ to 30.25¢ per Mcf, notwithstanding that the applicable area ceiling fixed by the Other Southwest Area Opinion provided for a maximum rate for Mitchell's sales of 18.859¢ per Mcf. At no time did Mitchell present any evidence of its costs and profits at either its existing 17.625¢ rate, at the 18.859¢ area ceiling, or at the 30.25¢ rate

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* A more detailed statement of the proceedings before the Federal Power Commission is contained in Part I of the Court of Appeals' opinion (Petition for Certiorari, App. A, pp. 4-14; 505 F.2d at 357-62).

proposed; nor was any effort made to demonstrate that Mitchell's costs differed from those of other producers in the area. Rather Mitchell predicated its request for rates 65% in excess of the area ceiling on its promise that, if granted the increase, it would undertake a specified exploration program over the next five-year period.*

Although testimony by Mitchell in support of the increase and testimony by the staff of the Federal Power Commission in opposition to the increase were received into the record, the testimony was not cross-examined, and the matter was subsequently submitted to the Commission as an offer of settlement.

On February 21, 1973, the Commission issued its principal order in this case, FPC Opinion No. 649, 49 FPC 424, in which, by a two-to-one margin (there being two vacancies on the five-member Commission), it approved the proposed settlement. The essential rationale of the majority was that the above-ceiling increase on flowing gas could be justified, since if Mitchell's exploratory program were successful, the incremental cost of new supplies, while more than

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* As noted by the court below, the exploration program it proposed to undertake if granted above-ceiling rates was no more extensive than the exploration program it had previously pursued without special relief (Petition, App. A. 9 n. 22; 505 F.2d at 360 n. 22).

double the applicable just-and-reasonable ceiling for new gas, would be less than the cost of alternative unregulated gas supplies; accordingly, said the majority, consideration of Mitchell's costs and profits at its existing rate, or at the applicable ceiling rate, or at the proposed above-ceiling rate was unnecessary. Chairman Nassikas dissented.

On appeal, taken by Congressmen Torbert H. Macdonald and Sidney R. Yates,* the United States Court of Appeals for the District of Columbia Circuit (per Judges Wright, MacKinnon, and Senior District Judge Jameson) reversed, and remanded the case to the Commission to reconsider in light of a full evidentiary record. Specifically, the court found that there was an absence of substantial evidence to support the Commission's findings (Petition, App. A. 16; 505 F.2d at 363), and that the Commission's attempt to justify the above-ceiling increase by reference to unregulated prices was barred by this Court's recent opinions in Mobil** and Texaco***, and

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* Congressman Macdonald is a member of the House Committee on Interstate and Foreign Commerce, and at the time the appeal was taken was chairman of that Committee's Subcommittee on Communications and Power. Congressman Yates represents constituents served by the gas for which the rate increase was allowed.

** Mobil Oil Corp. v. F.P.C., 417 U.S. 283 (1974).

*** F.P.C. v. Texaco Inc., 417 U.S. 380 (1974).

was, in any event, "simply inconsistent with the Commission's regulatory trust" (Petition, App. A. 18; 505 F.2d at 364).

Petitions for rehearing and for rehearing en banc were filed by Mitchell and by Natural Gas Pipeline Company (both of whom had intervened in the appeal proceeding in support of the Commission's order), but not by the Federal Power Commission. On December 2, 1974, the court denied the petitions for rehearing and for rehearing en banc, and Mitchell's petition for certiorari in this Court followed.

**REASONS FOR DENYING THE WRIT**

I.

The finding of the Court of Appeals that the evidentiary record before the Commission did not contain substantial evidence in support of the Commission's conclusions does not present any issue warranting grant of certiorari by this Court. And the holding of the Court of Appeals that the above-ceiling rate could not be granted--without evidence whether it would generate an excessive level of profits for Mitchell, and without evidence that Mitchell's costs differed from those of other producers subject to the area ceiling--solely because the resultant cost to the purchaser was less than the cost of unregulated fuels was, as the court below noted, required by this Court's unanimous opinion issued only last term in F.P.C. v. Texaco Inc., 417 U.S. 380 at 397-401.

Petitioner's claim (Petition 9-10) that the

decision below conflicts with the decision of this Court in Permian Basin Area Rate Cases, 390 U.S. 747 (1968), depends exclusively on the out-of-context quotation of three snippets from that opinion, all the while ignoring the Court's holding, which sustained the FPC's use of a cost-based standard for fixing just-and-reasonable rates as against producer claims that market price should have been utilized. Nowhere in the lengthy Permian opinion is there any holding that the Commission can, under the Natural Gas Act, use the unregulated market price as the standard for fixing just and reasonable rates. That was the issue presented in F.P.C. v. Texaco Inc., 417 U.S. 380, and resolved adversely to Mitchell's contentions here.

Petitioner's claim (Petition 10-11) that the decision below conflicts with holdings of the Fifth Circuit cannot be supported. It is true that in two opinions issued between the date of FPC Opinion No. 649 and the date of its reversal by the court below the Fifth Circuit adverted to the provision in the Commission's regulations for special relief proceedings, citing Opinion No. 649 as an example, Placid Oil Co. v. F.P.C., 483 F.2d 880 at 913 (5th Cir. 1973); Shell Oil Co. v. F.P.C., 484 F.2d 469 at 480 n. 22 (5th Cir. 1973). However, the passing references in the two Fifth Circuit opinions are clearly not holdings; neither Opinion No. 649 nor any other special relief case has been presented to the Fifth Circuit for review, and hence there is simply no way that there could be a conflict between the decision below and any decision of the Fifth Circuit.

II.

In any event, the Commission itself has now turned its back on the Mitchell doctrine reversed by the court below. Not only has the Commission failed to seek certiorari in this Court, but by a unanimous decision issued March 11, 1975 in Amoco Production Co., F.P.C. Opinion No. 723, the Commission has rejected the rationale of Opinion No. 649 in favor of the philosophy espoused by Chairman Nassikas' dissent to the earlier opinion. Whether this change in policy is the result of this Court's intervening decision in F.P.C. v. Texaco Inc., supra, 417 U.S. 380, or whether it is the product of a change in the Commission itself* is immaterial; the fact is that Opinion No. 649 no longer represents even the Commission's view.

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* As noted supra, FPC Opinion No. 649 was adopted by a 2-1 vote, with Commissioners Moody and Brooke forming the majority, and Chairman Nassikas vigorously dissenting. During the pendency of the appeal from Opinion No. 649, Commissioners Springer and Smith have joined the Commission, and Commissioners Moody and Brooke have departed. The Amoco opinion of March 11 represents the unanimous views of Chairman Nassikas and Commissioners Springer and Smith.

## CONCLUSION

The petition for a writ of certiorari fails to set forth any grounds for grant of the writ. Accordingly, the petition should be denied.

Respectfully submitted,

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